Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DEBORAH M. BORODATY and DORENE HAZELBAKER
Petitioners,

v.

WEST PENN POWER COMPANY, INC.,
a Pennsylvania Corporation
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the Court of Appeals through the procedural device of accepting as a matter of law the defendant corporations' explanation of male company personnel working without notice over top a women's shower room with a full view below effectively destroys the enforceability of Title VII's prohibitions against a sexually offensive and hostile work environment contrary to the expressed policy of this Court?**

II. **Whether the Court of Appeals erred in finding waiver of the issue of inadequate response, when the company failed to conduct any investigations in response to the 1994 allegations of unauthorized viewing and the matter was expressly reviewed with the Court in responding to the Rule 50 Motion at trial?**

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The opinion of the United States Court of Appeals was not reported and appears at Appendix p3A. The trial court's discussion of the United States District Court for the Western District of Pennsylvania Rule 50 grant is not reported and appears at Appendix p39A.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered November 1, 1999. Rehearing was requested but was denied on November 26, 1999. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners filed suit against Petitioner under the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., which provides:

§ 2000e-2. **Unlawful employment practices**

(a) **Employer practices.** It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Plaintiffs, Deborah M. Borodaty and Dorene Hazelbaker, filed this action against their employer, Defendant West Penn Power Company, Inc., (whose parent company is Power Systems) alleging that they have been subjected to a gender-based hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. Following the Answer by Defendant and discovery proceedings, Defendant filed a Motion for Summary Judgment which was denied by the Honorable Alan N. Bloch, United States District Court for the Western District of Pennsylvania.

A jury trial was held in this matter starting November 30, 1998. After presentation of the Plaintiffs, case, Defendant filed a Rule 50 motion which was granted by the Court as to the Plaintiffs' allegations of unauthorized viewing. Since these allegations constituted the gravamen of the Plaintiffs' complaints against Defendant, Plaintiffs withdrew their remaining claims against Defendant.

The Plaintiffs are two female employees who work as a part of the general labor force for the Defendants at their Mitchell Power Station facility. The Defendant provides restroom and shower facilities for male and female members of the labor force. These facilities are separate with separate facilities designated for use solely by the female employees.

On or about October 27, 1994, it was discovered that persons had gained access to the ceiling area above the women's showers and restroom. This was based upon a finding of dirt on the toilets that could only have come from the ceiling above. 98a-101a; 224a-227a.[1] Company explanations that a blower was

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[1] Page numbers followed by lower case letters designate pages of the Appendices filed in the Court of Appeals for the Third Circuit.

responsible was disproved by the location of the duct compared to other locations. 225a-227a. Management had explained the dirt found over and around the commode in the women's rest room as having resulted from turning on a blower following a shutdown for repairs. The plaintiffs, however, had noted that no dirt had appeared around an adjacent vent. During the inspection when toilet paper was held up to the vent, the paper was sucked up against the vent, indicating the vent was probably part of an air return rather than a blower. 102a-103a. Management also showed the plaintiffs dry-wall that had been put in the ceiling area as part of an asbestos project, not a security measure. The dry-wall was easily removable and may have already been penetrated since installation. 100a. This was a recurrence of a similar event as described below. The company had failed to undertake adequate precautions to protect against recurrence.

Earlier in October of 1991, female management personnel had mentioned to the Plaintiffs a suspicion that another employee and/or employees may be observing the women during the course of showers and/or other restroom activities. 292a-293a. Based upon this information, Plaintiffs undertook an investigation of the facility and determined that there existed access to the ceiling overlooking the women's showers and rest rooms. 293a-294a.

A visual inspection revealed that insulation material had been pulled back from the areas of the ceiling overlooking the shower area and restroom stalls. Empty beverage cans and cigarette butts were also found. 206a-211a; 295a-301a; 619a. Boot prints were also noted. 301a, 385a.

Immediate complaints were made to Union representatives and management personnel. But the Union indicated that it would not handle the matter nor process the grievance because it anticipated the necessity to defend employees who might become charged with misconduct. 91a-92a; 212a-213a. Following this, management initiated an investigation. However, investigating personnel appeared to engage in obstructive tactics, such as

misstating the statements of the complaining employees. 86a-91a; 313a-319a. The investigator also observed, but did not secure physical evidence such as soda cans. 619a. The investigator also knew that Ed Rodebaugh, an employee who had previously exposed himself to at least two women at the plant had been in the ceiling access area, had looked through the pulled back insulation, realized that he was over the ladies' shower room, and failed to report this to management. 616a. The investigator did not tell this to the complainants. 619a.

No effective remedial action was taken. The specific entranceway found was tackwelded and a painting contractor who was brought in to paint the ceiling did a very poor job. 93a. The women themselves were forced to paint over the visual peeping access holes through the ceiling tile. 95a. Additionally, the women discovered additional access ways to the ceiling area. 95a, 96a.

Subsequently, a West Penn Power, Inc. employee was arrested for extortion, apparently threatening to expose a fellow employee as an alleged sexual pervert and/or peeper. Charges were dropped against the employee when another individual plead guilty. The company cooperated with the alleged pervert/peeper, providing a company vehicle to transport him to various court proceedings to prosecute an alleged extortionist. 48a-51a. No action was taken against the alleged pervert/peeper. As a result of a motion in limine which was granted, the trial court did not admit this evidence in the trial. 51a.

Following disclosure of the evidence that the women had been subject to unauthorized viewing while nude in the shower, the Plaintiffs became the subject of numerous jokes, substantial teasing and otherwise subject to humiliating comments by male employees. Said jokes, teasing and humiliating comments continue to the present. 109a-110a; 230a-232a. The women suffered depression, anxiety, had problems at home, and modified their work habits to avoid the restroom. 223a; 233a; 453a-463a.

Other observations/peeping incidents occurred at other West Penn Power, Inc. facilities prior to discovery of these events at the Mitchell Power Station, located at Route 837 in Monongahela, Washington County, Pennsylvania. 111a-112a; 131a-132a.

The alleged "peeper" (Rodebaugh) had exposed himself (exhibition of sexual organs and/or touching of personal private parts in view) to at least two of the women at the plant, including Plaintiff Borodaty. 78a-85a; 426a; 428a-429a. This offensive conduct, including the peering here at issue, would normally not be considered a part of the proper employer/employee relationship, is an offensive and undesirable personal trait, and should not be tolerated by management.

Defendant knew or should have known that the premises should have been provided with adequate security in order to protect the privacy and other rights of the female employees in their shower and/or restroom area. This is particularly true since Defendant had notice of the prior activity from 1991, yet permitted the activity to recur in 1995.

Despite being fully aware of the danger of privacy invasion and/or other offensive acts against the female employees, Defendant failed to make reasonable, adequate and necessary provisions for their security including, but not limited to:

A. Controlling access to the ceiling areas by locking and/or otherwise securing grates, tiles and/or other access routes.

B. Partitioning the women's shower/restroom area in the ceiling to insure those with access to the ceiling would not overlook the women's shower areas.

C. The Respondent's breach of duty to provide their employees with adequate building security enhanced the likelihood that offensive activity would recur.

D. Specifically assigning or permitting an individual with tendencies to anti-social conduct with females (e.g., exposure), to be in an area with access to the women's locker room, contrary to regulations and policy which limited access to ceiling areas.

Although the Defendant has established a security unit for the purpose of protecting West Penn Power, Inc. employees and/or property, these security services were provided in a fashion to the detriment of the Plaintiffs as follows:

A. Failed to adequately control and/or discover and/or lock or secure access ways to the ceiling area over the women's shower/restroom area.

B. Failed to conduct a proper investigation.

C. Withheld certain facts from the plaintiffs concerning the identity and opportunity and access to the locker area by the "peeper." 619a.

Additionally, the Defendant failed to adequately follow-up complaints and/or allegations to remove such personnel who constitute a danger to their co-workers allowing continued employment. It is noted that as a part of this failure, the peeper/pervert, who has repeatedly exposed himself to female employees remains in the general labor force. At all times, the company has continued to protect this male employee and hence it is obvious that the matter is of a continuing nature. Discovery information has revealed that the individual, Ed Rodebaugh, had exposed himself to employees as outlined and was assigned by supervisors to the ceiling area shortly before the time of initial discovery. 614a-616a.

Pictures of the premises made in March 1998 were submitted to the jury which showed:

a. The air duct from which the dirt appears to have come was noted to have an area of a vent pried out at the duct joint, from which you could see into the toilet area of the ladies' restroom. 410a-411a.

b. The duct area was located near a wall which could support weight. This wall intersects with the men's rest room at a pillar. 410a.

c. On the men's restroom side, there was an indication of two or three handprints on the tile near the pillar. A footprintlike marking was on the drywall on the ceiling above the tiles, over top of the pillar area. 402a

d. The ceiling review also revealed the appearance that another drywall panel near the corner of the partitioned area, outside the former women's lunchroom, had repairs to screw holes with putty and paint over. Other apparent boot prints were noted upon removal of the outside ceiling tile. 405a

e. The bootprints noted over the pillar area and under the outside ceiling tile appeared similar.

These circumstances confirmed that the problem was on-going.

However, following presentation of plaintiffs' case, the district court granted defendant's Rule 50 motion, finding that there was insufficient evidence of peering and/or inadequate response to the complaint of unauthorized viewing.

The Third Circuit, in an unpublished memorandum by Circuit Judge Mansmann found that the lower court correctly accepted the explanations of corporate management, for legitimate

reasons for employers to be over the shower area, as a matter of law. Judge Mansmann's reading of the record further suggested that the issue of inadequate viewing had been waived, despite it being part and parcel of the argument against the Rule 50 motion.

REASONS FOR GRANTING THE WRIT

A. This Court should grant certiorari because paramount federal policy against sexual harassment will otherwise be undermined by an unsympathetic regional judiciary willing to accept company explanations of male worker presence over a blue collar ladies' restroom and shower facility, as a matter of law.

The issues and problems presented by this appeal demonstrate the most effective devices available to the lower federal courts to completely defeat important and expressed federal policies with which they are not in agreement. This case raised issues of the first rank concerning the protection of the dignity of a small contingent of women painfully attempting to break into the harsh reality of blue collar work in western Pennsylvania. Their fundamental right to freedom from a pattern of sexual harassment, male access to viewing areas above the ladies' shower and commode regions obviously creating a hostile work environment and providing a perverse form of male entertainment has received not the slightest sympathetic judicial ear. Instead, through the use of a procedural device, the Rule 50 motion, based astonishingly upon the acceptance of the company's explanation for the presence of the male employees as a matter of law, the Pittsburgh federal judiciary renders unenforceable controlling federal policies.

The difficulty of this approach, coupled with the near inability to obtain review by the U.S. Supreme Court on Rule 50 questions, is that federal policy is destroyed almost effortlessly and silently. There need be no debate over the nuances of supervisory liability under Title VII. There need be no anquish on the balance between a woman's right to dignity and a supervisor's productive career. All is quietly swept away under the rubric of insufficient evidence. After all, pursuant to Rule 10 of the Rules of the Supreme Court:

A petition for a writ of certiorari is rarely granted where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

This sensible rule protects the Court from a function it normally cannot be expected to perform. After all, the facts can be fairly reviewed by the trial judge and Court of Appeals. Precious judicial time at the highest level can be preserved for the good faith resolution of legal conflicts which manifest themselves among the intermediate Courts. The Supreme Court's reserve in granting certiorari is well known in the profession, even understood at the far reaches of the business - those attorneys working above store fronts seeking to aid individuals in their struggle against corporate power supported by a philosophically unsympathetic regional judiciary.

However, there must be an occasional exception to the well-honored rule or else society will suffer, case-by-case, fact by unrecognized fact, the practical elimination of otherwise revered ideals of justice and equality. An examination of this record demonstrates plainly the danger. Substantial circumstantial evidence of the "peering" has been ignored, not permitted even to be reviewed by a jury. The soul-hardening message has been loudly delivered to the blue collar female contingent at the Mitchell Power Station on the banks of the Monongahela River. They are to be barely tolerated. They are not to make trouble asserting basic rights of human dignity. There is no forum that will afford their complaint even the slightest respect. What lesson should they pass on to their daughters about economic or judicial fairness?

It is submitted, that on occasion, this Court should exercise its supervisory powers, to wake up the lower courts and to demonstrate that rulings which effectively though quietly destroy federal policy and the justice they reflect in the hearts of the citizens seeking to invoke the law's protection, will not be tolerated.

The defendant argues that these facts are insufficient to establish a case for a hostile work environment under Title VII pursuant to factors suggested in Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993). The District Court had reviewed essentially the same facts before the trial and had denied the defendants' motion for summary judgment. However, at the conclusion of the plaintiffs' case, the court reversed its position. At that time, the district court granted defendants' Rule 50 motion, finding insufficient evidence to establish peering or a hostile work environment based upon the absence of secure restroom facilities for the women. App. 634a. Under Harris, the court is to examine "all the circumstances" which may include: 1) frequency of discriminatory conduct, 2) severity, 3) whether it is physically threatening or humiliating, or a mere offensive utterance, and 4) whether it unreasonably interferes with an employee's work performance. As noted in the statement of facts above, an evaluation of these factors heavily favors the plaintiffs here.

A review of all the circumstances here demonstrates that the frequency of the discriminatory conduct alleged here is ongoing. Accordingly, the court reviewed both the 1991 incident and the 1994 incident. It was contended that the identity of at least one of the peeper/perverts has now been reasonably established, yet he continues to remain in the work force. His identity was deduced based upon his earlier repeated sexual exposures to other women and his admission that he had been in the ceiling peering into the restroom through the insulation holes to the investigator. However, he sought to justify it as part of a work detail, an explanation the jury could reject. It should have come as no surprise at all to the defendant that in the absence of any form of discipline or even counselling, that evidence would eventually again surface that there would be a repeat of the peering above the ladies' shower and toilet stalls. Additionally, the hostile atmosphere continues to be perpetrated in a more general way with the continuing existence of pornographic magazines and pictures at the plant, discrimination in promotions and work assignments, the continuing teasing by male employees and references about the peeping incidents, the "old

boy" attitude and resentment of women "doing men's jobs" that was pervasive at the company, and the failure to take the complaints of the women employees seriously. 485a-489a; 501a-504a; 109a-110a; 230a-232a.

The lower court was willing to proceed regarding the complaints of pornographic magazines and comments. However, the effect of the Rule 50 ruling was to gut the case of plaintiffs' allegations. At that point, plaintiffs concluded it was futile to continue, withdrew the remaining allegations, and sought the instant appeal.

It is equally obvious that the peeping/peering and other matters constitute a gross invasion of privacy far exceeding the bounds of what reasonably should be tolerated and therefore can only be considered as severe. It is also clear that the conduct is extremely humiliating as each of the women testified. 107a-108a; 112a; 223a-224a; 233a-236a.

Finally, it unreasonably interfered with the employees' work performances in that it was distracting, broke the trust and sense of security the women employees had had and were entitled to expect from the company.

Similar facts were found to rise to a Title VII violation in Liberti v. Walt Disney World, 912 F.Supp. 1494 (M.D.Fla.1995). That case recognized that an employee's conduct of videotaping other employees in the dress room and rest room areas rose to the level of a hostile environment claim. It is noted that in Liberti, the court emphasized the failure of the company to take reasonable action in response to the complaints. In the instant case, a genuine jury issue existed with regard to the company's response. The women themselves were forced to paint over the holes in the ceiling tile. 95a. Eventually, the company did place dry wall around the lady's room ceiling area, although this occurred as a part of a general asbestos removal plan. However, the dry wall was easily removable and the ceiling itself remained readily accessible.

100a. Investigation has revealed that visual peering could again be achieved through a gap in the splicing of the duct work above the toilet stalls. 410a-411a. Most importantly, the most likely offender, Rodebaugh, of whom the company knew there were numerous complaints of antisocial conduct, had received no discipline or even suggestion of counselling.

Further, it would be clear from the facts of this case that there exists a "continuing violation." The Third Circuit has recognized the validity of this theory as it applies to a hostile work environment claim in West v. Philadelphia Elect. Co., 45 F.3d 744 (3d Cir. 1995). West suggested that inquiry into the existence of a continuing violation under Title VII considers: subject matter - whether violations constitute the same type of discrimination; frequency; and permanence - whether nature of violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. Id. at 755, n. 9. Thus, the Third Circuit recognized that continuing violation exists when there was consistent harassment together with selected major incidents. Similarly, in this case there has been regular and pervasive discrimination as demonstrated by the continuing existence of pornographic magazines and pictures at the plant, discrimination in promotions and work assignments, the continuing teasing by male employees and references about the peeping incidents, the "old boy" attitude and resentment of women "doing men's jobs" that was pervasive at the company, and the failure to take the complaints of the women employees seriously. This general ongoing discrimination has been punctuated by the discovery of the major events of unauthorized peering. Further, Rodebaugh was continually left free to indulge his proclivities without fear of discipline or counselling. However, the lower court's Rule 50 ruling eliminated the major components of the claim from the jury's consideration.

Additionally, it should be noted that the Third Circuit has recognized the importance of earlier harassment in a sexual

discrimination hostile environment case in Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997). In Rush, the court recognized the applicability of the continuing violation theory to where there was a continuing pattern of derogatory remarks and rude behavior. Similarly, West, supra, remanded the matter for a new trial on the basis of the wrongful exclusion of evidence of prior incidents. However, the court here in the instant case found as a matter of law that there was no peering in 1991 or 1994, completely undercutting the cause of action.

B. This Court should grant certiorari in order to establish at the highest level a national precedent requiring employers to conduct an investigation and adequate response to complaints of a hostile environment regardless of whether the complaint is subjectively viewed as founded by the management.

Alternatively, it should be noted that even if the lower court was correct in determining that, as a matter of law, no peering was demonstrated, nonetheless a cause of action existed for a hostile work environment on the basis of the company's inadequate response to the allegations, leaving the ladies with a sense of insecurity concerning the restroom facilities.

When the dirt on the commode seats was again discovered in 1994, no investigation was conducted. The ceiling tile was popped and the ladies were simply told that no-one could get to the area due to the existence of the drywall.

As the Third Circuit noted in Knabe v. Boury Corp., 114 F.3d 407, 414 (3d Cir. 1997), some investigation must be conducted:

> An investigation must be undertaken, see Swentek v. USAir, 830 F.2d 552, 558 (4th Cir. 1987)("In taking remedial action, USAir was obliged to investigate Swentek's charges and to present a reasonable basis for its

subsequent actions."), and an employer can be held liable if a faulty investigation renders its subsequent remedial action inadequate, i.e., not reasonably calculated to prevent further harassment.

Here, in response to the 1994 complaint, the company took virtually no action. Nothing remedial was done. This clearly was not reasonably calculated to prevent further harassment. The company's position, apparently endorsed by the district court in the grant of the Rule 50 motion, was that the ladies' fears and anxieties are the product of an overactive imagination, hence justifying a continued ignoring of their concerns.

Clearly, even if this was the only evidence, some action would have been required by the company, since this was similar to the 1991 evidence which led to the discovery of the rolled back insulation. However, when a further investigation was conducted during the Human Relations Commission inspection, and later confirmed by pictures taken in 1998, numerous other circumstances came to light strongly suggesting the opportunity for further peering. Footprints appeared on the drywall. 402a; 405a; 410a. The drywall was damaged in the fastening areas. 100a. The prints were located near weight-bearing walls leading to the areas above the commodes. 410a. The area above the commodes where the dust was discovered had been subjected to tampering: specifically, the duct joint had been pried open, again allowing for a view of the ladies restroom. 410a-411a. Astonishingly, even after this information was discovered, the company refused to acknowledge the possibility of a problem, took no remedial action, and continued to attack the foundation of the women's concerns.

The absolute intransigence of the company to the concerns of the women is exactly the harm sought to be addressed by federal sexual harassment law. Management personnel responsible for females in the blue collar force at the Mitchell Power Station along the Monongahela River have not conducted themselves as models of sensitivity to these concerns.

The history of the continuing violations shows the following course of conduct. The women initially discovered rolled back insulation over the shower area providing clear views of the are as well as over the toilet area and the changing area by the lockers. Soda cans and cigarette butts were found in the ceiling are near where the insulation had been pulled up. 293a-294a; 206a-211a; 295a-301a; 619a. The lower court refused to even acknowledge that this would be a legitimate concern. 629a-634a. An investigator was called in. He failed to secure the soda cans, although he observed them in the ceiling. 619a. He discovered from talking with several ladies that Ed Rodebaugh had previously been in the area of the ladies' showers, had peered down into the shower area and had not reported this breach of security. He chose not to tell the ladies this information. Instead, he asked some of them to sign statements about the exposures which contained misinformation. When the ladies declined to sign these statements, he went no further, although he claimed the investigation into the peering remained open. His final recommendations to management were whited out from his report and not disclosed to the plaintiffs. This goes beyond even a flawed investigation but is itself part of the problem resulting in an inadequate response. Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475 (9th Cir. 1997); Mockler v. Multomah County, 140 F.3d 808 (9th Cir. 1998). The union would not take a grievance. 91a-92a; 212a-213a. An initial effort to paint over the holes in the ceiling tiles failed. 93a. The women themselves, upon complaint, were forced to do the job themselves. 95a. No disciplinary or counseling action was taken as to Rodebaugh, which was obviously needed to protect the women. Such failures can amount to an inadequate response on proper facts. Bonenberger v. Plymouth Township, 132 F.3d 20 (3d Cir. 1997); Yamaguchi, supra.

In contrast, a later extortion attempt against Rodebaugh was met with full cooperation by the company to protect Rodebaugh, including a referral to the state police and the use of oral

interception devices. The lower court ruled this information not relevant, granting a limine motion. 48a-51a.

Years later drywall was placed around the restrooms. When dirt again appeared at the commodes, virtually nothing was done.

The purpose of claims of a sexually hostile working environment is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men. Title VII embodies a series of criteria that seeks to halt extremely insensitive conduct against women, conduct so egregious as to alter conditions of employment and destroy their equal opportunities in the work place. DeAngelis v. El Paso Municipal Police Officers Assn., 51 F.3d 591 (5th Cir. 1995).

The callous disregard of the rights of these women, relating to the most fundamental concern of restrooms and showing security has had the harmful effects that Title VII was designed to protect against. They have been labeled "trouble-makers." They have experienced depression, anxieties and other psychological harms. 453a-463a. It has interfered with their home life. 233a. They seek to avoid use of the facilities, if it is at all possible. 223a. There have been no promotions. While none would claim that it would be easy to assimilate a small number of women into the gruff and difficult blue collar work environment of a power plant, nonetheless, under federal law, the company owes these employees the minimum of a level playing field. The goal is not remotely met under these circumstances where their complaints of basic security are not taken seriously. The absence of a reasonable investigation and the absence of any remedial efforts clearly violate the statutes.

Finally, this Court can give strong national guidance on the need to atleast conduct an investigation in response to complaints. To date, this would appear to be an important issue of first impression at this level. Guidance for the lower courts can be provided on the minimum requirements an employer is obliged to

undertake. Such reasonable guidance would serve to protect both sides of these delicate issues.

Some circuits already make it clear that in Title VII claims against an employer grounded in allegations of co-worker harassment, the act of discrimination is not the harassment, but rather the employer's inadequate response to the charge of harassment. eg. Blankenship v. Parke Care Centers, Inc., 123 F.3d 868 (6th Cir., 1997). However, the Court in Blankenship was willing to impose liability on the employer only if the response exhibited such indifference as to indicate an attitude of permissiveness that amounted to discrimination. In that case, the employer's response was adequate as a matter of law.

Other circuits have adopted other language for the test, in an apparent effort to follow this Court's lead in Burlington Industries v. Ellerta, 542 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). That case suggested that an employer is negligent if he knew or should have known about the conduct and failed to stop it. It further held that an employer is vacariously liable for a supervisor's creation of a hostile work environment, subject to the affirmative defense "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior. Burlington, 118 S.Ct. at 2270.

The Tenth Circuit specifically cited the foregoing language from Burlington, in adopting their standard. Baty v. Willamette Industries, Inc., 172 F.3d 1232 (10th Cir., 1999).

The Eighth Circuit has specifically held that employers cannot do nothing in response to a complaint, simply because the accused employer denies the conduct and there is no corroboration. Hathaway v. Runyon, 132 F.2d 1214 (8th Cir., 1997).

The Fourth Circuit, in Harris v. L. & L. Wings, Inc., 132 F.3d 978 (4th Cir., 1997) made an effort to articulate a sensitivity

to the legitimate needs of the employer, even while affirming an award of punitive damages for the wanton disregard of the employer's rights:

> Wings suggests, however, that the complex legal requirements in this whole area left it at sea. We are mindful of the difficulty employers face when dealing with claims of harassment, finding themselves between the rock of an inadequate response under Title VII and the hard place of potential tort liability for wrongful discharge of the alleged harasser. The legal standard of "prompt and adequate remedial action" in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser. Knabe v. Boury Corp., 114 F.3d 407, 414 (3d Cir.1997). ("[A]n employer, in order to avoid liability for the discriminatory conduct of an employee, does not have to necessarily discipline or terminate the offending employee as long as the employer takes corrective action reasonably likely to prevent the offending conduct from reoccurring."). And a good faith investigation of alleged harassment may satisfy the "prompt and adequate" response standard, even if the investigation turns up no evidence of harassment. Kilgore v. Thompson & Brock Management, Inc., 93 F.3d 752, 754 (11th Cir.1996). Such an employer may avoid liability even if a jury later concludes that in fact harassment occurred. See Fitzgerald, 68 F.3d at 1264. But Wings did absolutely nothing to address the harassment of which Harris and Prasky complained. And this total absence of a response, not to mention a "prompt and adequate" one, is cognizable evidence of Wings' indifference to the federally protected rights of those in its employ. (Emphasis added). 132 F.3d at 984.

Clearly, sufficient facts had been put forth before the court to survive the Rule 50 motion concerning the core allegations of the hostile environment. The matter should not have been taken

from the jury as a matter of law. The line between a merely unpleasant working environment on one hand and a hostile or deeply repugnant one on the other, is not a bright line. When it is uncertain on which side the defendant's conduct lies, the matter rests with the jury. The jury, made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment under Title VII. Gallagher v. Delaney, 139 F.3d 338 (2d Cir. 1998).

In this case, the lower court committed error, effectively gutting the case, in granting a Rule 50 motion concerning the women's allegations of peering and the company's response thereto. This ruling should be reversed for two reasons. First, there were sufficient facts to allow the jury to infer the existence of peering. It could not be said that peering did not exist as a matter of law. Second, whether peering in fact occurred or not would not be determinative of the hostile environment claim concerning the allegation of peering. The company still had a duty to investigate and take appropriate remedial action to assure an appropriate measure of security to the facilities. These matters belonged to the sound purview of the jury. The Rule 50 motion should not have been granted unless the evidence and justifiable inferences most favorable to the employees would not have afforded any rational basis for a verdict in their favor. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997).

Defendant West Penn Power also maintains that the plaintiffs have waived the issue of whether or not its response to the claims of unauthorized peering constituted in itself the creation of a hostile environment, whether or not such peering actually occurred, by withdrawing its remaining claims after the Rule 50 motion. However, a review of the record makes it clear that this contention was part and parcel of the argument concerning unauthorized viewing, and that the court felt that if there was no evidence of peering, as he had found as a matter of law, that there would be no need for the company to respond to the claim.

Counsel brought this to the Court's attention on the record at RR. pp. 637a-639a:

> MR. SUWAK: .... First, Judge, just so I have articulated fairly, we would indicate that the issue is not a factual issue of, do we prove that there was actual peering? We believe that rather the situation, in terms of creating a hostile environment, is more along these lines:
>
> One. Were there circumstances that would subjectively raise the concern in the minds of the plaintiffs?
>
> Two. If there were, then what was the nature of the company's response? This is not a criminal case where are attempting to allocate responsibility onto a particular person. But, under circumstances were there were sufficient issues to raise the alarm, the inability of the company to respond and secure the environment of the ladies' restroom itself would create a hostile sexual environment.
>
> So, we would respectfully request the Court consider the effort not in the concrete terms like would be done in a criminal case, but rather in the broader view associated with a hostile environment.
>
> THE COURT: So, you are saying even if the peeking didn't occur, if the -- if the company doesn't respond to the non-peeking, because the plaintiffs perceive that peeking took place even though they have no proof that it did, that that can amount to a hostile work environment?
>
> MR. SUWAK: If you don't respond to the insulation being pulled back over top the ladies' locker room.

THE COURT: We have to assume that the peeking didn't occur, because I have found that you didn't put that --

MR. SUWAK: I understand that, and I am not sure that it argues that the peeking occurred. What I am saying is, that if you have a work environment -- if I'm called to work in this courthouse and the insulation is removed from my ceiling so that there is holes, and we understand that regular work duties will put male workers over top of me, then I respectfully submit that that evidence demonstrates that there must be some response by the company to correct that. Otherwise, if peeping occurred or not, if you put a window in front of my restroom and bring members of the opposite sex and give them the opportunity to view me, that opportunity would create a sufficient hostility.

THE COURT: Do you have any law to support that position?

Opposing counsel made it clear that the question of inadequate investigation would not be reached if there was no preliminary finding of peering. The court was inclined to agree unless he was presented with clear contrary case law:

MRS. SMITH-DELACH: Your Honor, if I may respond? One of the elements -- the first element that has to be shown is that the employee suffered an intentional discrimination because of his or her sex. And not only that, but then the question becomes whether or not the respondeat superior liability exists, and that gets into the question of whether or not there was adequate investigation and reasonable measures taken. Our whole -- the point is that there was no reasonable -- He didn't have any proof that peering occurred.

THE COURT: I understand that, and I agree with you factually he is saying that's not necessary.

MRS. SMITH-DELACH: I think it has to be.

THE COURT: I know. But, I am going to look at his cases. My inclination is to agree with you, but I want to give him the opportunity to look at the cases he says supports his position. RR. 641a -642a.

The court then distinguished each case brought to its attention and refused to accept plaintiff's theory. The court then made it clear that the causes of action related to the peeking incidents were dismissed and that other specific claims regarding pornographic calendars or photographs and/or jokes would be withdrawn. See RR. 648a-649a, especially the distinction among the claims at 648a line 25 and 649a, lines 1-3.

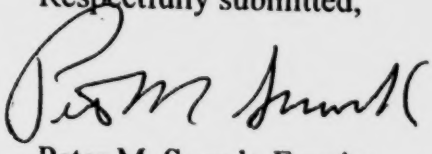
From the above record it is apparent that the plaintiffs would have proceeded with a hostile work environment claim if the court would have recognized the theory that a hostile environment would be created on the basis of failure to take the claim of unauthorized peering seriously whether or not a particular individual could be identified.

This Court is urged to bring clarity and power behind this important federal policy. This case reflects the ease by which an unsympathetic judiciary can undercut these important policy concerns.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



Peter M. Suwak, Esquire